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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability company,

Plaintiff,

vs.

FACEBOOK, INC., a Delaware corporation; MARK ZUCKERBERG, an individual; CHRISTOPHER COX, an individual; JAVIER OLIVAN, an individual; SAMUEL LESSIN, an individual; MICHAEL VERNAL, an individual; ILYA SUKHAR, an individual; and DOES 1 through 50, inclusive,

Defendants.

Case No: CIV 533328

Assigned for all purposes to Hon. V. Raymond Swope, Dep't 23

REQUEST TO STRIKE FACEBOOK'S IMPROPER "OPPOSITION" AND "REPLY" IN SUPPORT OF CHALLENGE FOR CAUSE (CAL. CODE CIV. PRO. §§ 170.1 AND 170.3)

(UNLIMITED JURISDICTION)

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INTRODUCTION

Can Facebook take advantage of circumstances it caused to prevent a just resolution of this litigation? The current filings demonstrate that Facebook is incapable of seeing its own role in causing the "predicament" now facing this Court. Indeed, this Court must remember that it was Facebook's decision in November 2018 to accuse Six4Three's counsel of engaging in a criminal conspiracy that started the chain of events that required their mandatory withdrawal, leaving Six4Three unrepresented and causing no new counsel to take over representation until last month. The Court of Appeal already determined that forcing Six4Three's former counsel to remain in this case was clear error. That error put Six4Three, a corporate (LLC) defendant, in the impossible position of appearing as if it had counsel when in fact no attorney was acting as a "zealous advocate" or as anything other than an inactive if not unconscious opponent allowing a local champion to land a few more blows through one-sided orders which Facebook submitted and which this Court signed as written. Meanwhile, Judge Swope permitted Facebook to run a months-long *ex parte* proceeding seeking retribution and punishment from Six4Three, its principal and its legal team—without ever (even to this day) filing any affidavit, any declaration under oath, any motion or any other verified pleading alleging any actual wrongdoing.

Now, Facebook's counsel baits Judge Swope yet again to err and flout the clear procedure of Section 170.3 by permitting Facebook to file an improper "opposition" to Six4Three's Section 170.1 Disqualification. The crux of Facebook's improper "opposition" is that Six4Three waived its challenge by waiting too long to file it, while entirely ignoring the plain-as-day truth: as a corporate defendant, Six4Three was legally unable to file any challenge or disqualification as a result of Facebook's accusations and Judge Swope's clearly erroneous and highly prejudicial procedural decisions—the very decisions that led Six4Three to seek disqualification. It would be a gross abuse of justice if Facebook could successfully impair Six4Three's constitutional rights to an impartial proceeding because Facebook's actions and Judge Swope's decisions made it *impossible* for Six4Three to exercise those constitutional rights for more than eight months.

FACTUAL BACKGROUND

On November 26, 2018, Facebook filed an *Ex Parte* Application for Expedited Relief Regarding Six4Three's Contempt, seeking to hold Six4Three and its former counsel, David Godkin

and Stuart Gross ("Former Counsel"), in contempt and requesting an Order to Show Cause on terminating and monetary sanctions against Six4Three and its Counsel, including the taking of depositions of Six4Three's counsel. Request for Judicial Notice ("RJN"), Ex. 22. Judge Swope then ordered that Former Counsel "shall not withdraw from representation of plaintiff until the matters in relation to the distribution of those confidential documents is resolved. You're not going anywhere. And you are ordered to remain in this case." Declaration of Matthew J. Olson in support of August 6, 2019 Statement of Disqualification ("Olson Decl."), Ex. 1 at 52:19–26. Six4Three and Former Counsel made the Court aware that Facebook's accusations ethically and legally barred Former Counsel from representing Six4Three as they also were required to defend themselves. For instance:

Dec. 14, 2018	Former Counsel requested an Order Shortening Time to file Motions to Be Relieved as Counsel ("Motions to Withdraw"). RJN Ex. 23.
Dec. 17, 2018	Judge Swope denied the request and set the Motions to Withdraw for hearing on February 7, 2019. At hearing, Former Counsel reiterated they were no longer representing Six4Three and were legally barred. RJN Exs. 24; Olson Decl., Ex. 3 at 12:5-18; 26:5-17; 30:21-25.
Jan. 8, 2019	Former Counsel filed the Motions to Withdraw. RJN Ex. 25 & 26.
Jan. 24, 2019	Judge Swope *sua sponte* continued the hearing on the Motions to Withdraw to February 22, 2019. RJN Ex. 27. Former Counsel requested another hearing date and hearing was set for March 13, 2019.
Jan. 24, 2019	Six4Three's principal filed a declaration again stating that Former Counsel had not been representing Six4Three since November 2018 and further that Six4Three did not oppose Former Counsel's withdrawal. RJN Ex. 28.
Mar. 13, 2019	Judge Swope erroneously denied the Motions to Withdraw, but then filed a Minute Order vacating his denial and taking the matter under submission until June 11, 2019. Olson Decl. Ex. 9, Attch. 2.

On March 27, 2019, Former Counsel requested a stay of discovery until they could petition the Court of Appeal. RJN Ex. 29. On April 19, 2019, the Court of Appeal granted the writ petition and directed Judge Swope to stay proceedings until he resolved the Motions to Withdraw. RJN Ex. 30.

On April 30, 2019, Judge Swope granted the Motions to Withdraw and for the first time directed Six4Three to "promptly file and electronically serve its substitution of counsel," setting a conference on the retention of counsel for June 28, 2019. Olson Decl. Ex. 9, Attch. 13 at 2:10-17. This order did *not* require "full-scope counsel." The hearing was subsequently advanced to June 7, 2019, at which time Judge Swope ordered Six4Three's principal to "retain counsel for the corporation by June 28, 2019," with a declaration confirming retention of counsel filed by July 1, 2019. RJN Ex. 31.

This order did *not* require "full-scope counsel." On June 19, 2019, Judge Swope signed an order, prepared by counsel for Facebook (over the objections of Counsel for Mr. Kramer) finding that Mr. Kramer was "dilatory in retaining counsel" and ordering that counsel shall be retained no later than June 28, 2019. Olson Decl. Ex. 10. This order did *not* require "full-scope counsel."

On July 1, 2019, Mr. Kramer filed a declaration stating Six4Three retained counsel ("New Counsel"). RJN Ex. 32. On July 2, 2019, New Counsel filed a Notice of Limited Scope Representation to defend Six4Three against Facebook's actions in this collateral proceeding, and a Section 170.6 Peremptory Challenge of Judge Swope. RJN Exs. 33 & 34. On July 5, 2019, Facebook filed an objection to New Counsel's Section 170.6 Challenge. RJN Ex. 35. On July 9, 2019, Judge Swope struck the Section 170.6 Challenge. RJN Ex. 36. On July 12, 2019, New Counsel filed a Section 170.3 Statement of Disqualification ("July 12 Statement") that expressly "reserve[d] its right to seek disqualification for cause pursuant to Code of Civil Procedure § 170.1." RJN Ex. 37. New Counsel erroneously believed the July 12 Statement was required in connection with the pending application for a writ of mandate Judge Swope's Order striking the Section 170.6 Challenge, and New Counsel failed to serve the July 12 Statement on Judge Swope, causing Facebook to object to the July 12 Statement on July 17, 2017 and Judge Swope to strike the July 12 Statement on July 19, 2019, because it"disclose[d] no legal grounds for disqualification" and New Counsel "failed to personally serve the Statement on the judge alleged to be disqualified." RJN Ex. 38 & 39.

On August 1, 2019, Judge Swope signed without modification an order proposed by Facebook over Six4Three's objections that for the very first time required Six4Three to retain "full-scope" representation, and further to do so by the August 7, 2019 hearing, or within *three business days* ("August 1 Order"). Olson Decl. Ex 11. On August 6, 2019, New Counsel filed a Section 170.1 Disqualification along with a Section 170.3 Statement ("August 6 Statement") that expressly relied upon the August 1 Order as a ground mandating disqualification, as well as an amended Notice of Limited Scope Appearance. RJN Exs. 40 & 41. At hearing on August 7, 2019, Facebook requested Judge Swope to preside over a briefing schedule on New Counsel's Section 170.1 Disqualification, and Judge Swope ordered Facebook submit its "opposition" to the Section 170.1 Disqualification by August 8, 2019, and Six4Three file its "reply" by August 13, 2019.

DISCUSSION

1. Facebook's Improper "Opposition" to Six4Three's CCP 170.1 Disqualification Must Be Stricken as It Is Entirely Settled That Judge Swope Has No Authority to Permit Facebook to Participate, and Facebook Has No Right to Participate, in the Proceedings at This Stage.

It is entirely settled that the "only instance in which the statutory scheme appears to allow a party to participate in a disqualification dispute is when the challenged judge files an answer denying any or all of the allegations contained in a statement of disqualification, and the judge deciding the question of disqualification sets the matter for hearing or receives evidence in some other fashion." *Hayward v. Superior Court*, 2 Cal.App.5th 10, 38 (2016); *see also* Code of Civ. Proc. § 170.3(c)(6). "The statutory scheme places the decision whether to contest the factual basis of a statement of disqualification solely in the hands of the challenged judge," because "a request for disqualification is not genuinely a 'motion' but…a charging document." *Id.*

For this reason, "the determination of a judge's disqualification is outside the usual law and motion procedural rules." *Urias v. Harris Farms, Inc.*, 234 Cal.App.3d 415, 422 (1991); *see also Hayward*, 2 Cal.App.5th at 38–39 (a party "cannot complain that it was not given an opportunity to be heard before the judge was disqualified."). The plain language of Section 170.3 sets forth a strict procedure for a Section 170.1 disqualification. Indeed, the main case cited by Facebook agrees with this black letter law. *Tri Counties Bank v. Superior Court*, 167 Cal.App.4th 1332, 1337 n.3 (2008) ("The procedure is different from traditional motion practice. No hearing date is required and there is no provision for opposition papers to be filed by the nonobjecting litigants.").

Facebook's "opposition" is really a thinly disguised motion to strike erroneously authorized by Judge Swope, the consideration of which is prejudicial to the process established by the Legislature. Judge Swope has not yet filed any verified statement or taken any action with respect to the disqualification, but Facebook seeks to act as his attorney and improperly feed him arguments. For these reasons, it is evident that the improper "opposition" must be stricken, and that Judge Swope should not rely on it in any verified statement he may choose to file.[1]

[1] That Facebook successfully baited Judge Swope once again into erring in violation of statutorily

2. Six4Three Filed Its Disqualification of Judge Swope at the Earliest Practicable Opportunity, and It Cannot Be Stricken for Timeliness.

It is not disputed that a party must file a Statement of Disqualification "at the earliest practicable opportunity after discovery of the facts constituting grounds for disqualification." *Magana v. Superior Court*, 22 Cal.App.5th 840, 856 (2018). This is precisely what Six4Three did. Six4Three could not possibly have filed its Statement of Disqualification any earlier than it did because it was without counsel. Following the retention of New Counsel to address the discovery and potential sanctions issues in this collateral proceeding, the August 6 Statement was filed.

a. As an Unrepresented Corporation, Six4Three Had No Ability to File Any Challenge Against Judge Swope from November 2018 Until July 2019, Because Judge Swope Forced Six4Three's Former Counsel to Remain in the Case and Refused to Consider Their Withdrawal During this Entire Period.

It is beyond cavil that Six4Three was unrepresented during the time that all of the conduct discussed in the August 6 Statement occurred. Immediately upon the filing of Facebook's November 26 *Ex Parte* Application, Judge Swope ordered from the bench that Former Counsel was "not going anywhere." Olson Decl., Ex. 1 at 52:19–26. Nevertheless, Six4Three and Former Counsel made clear that Former Counsel was unable to represent Six4Three and repeated this at every hearing since. *See* Olson Decl., Ex. 1 at 37:9–15. Former Counsel filed Motions to Withdraw shortly thereafter.

All of the comments and conduct relied upon as grounds for disqualification—including the November 30, December 7, March 13, March 15, and May 10 hearings—occurred during the time when Six4Three was unrepresented and could not have taken any action relative to these statements.

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mandated procedure is yet another new fact that might lead a reasonable person to doubt Judge Swope's impartiality. Six4Three respectfully requests that the judge who decides upon the disqualification admit all of the additional facts set forth in this brief into the record as additional grounds upon which disqualification is mandated. Moreover, no further briefing from Facebook may permitted with respect to this matter; to allow otherwise risks further prejudicing these matters and impairing Six4Three's constitutional rights to an impartial proceeding.

Further, Judge Swope ordering an "opposition" followed by a "reply" grants Facebook nearly one-third more space to make its arguments which greatly prejudices Six4Three's rights to oppose its effective motion to strike. Remarkably, Facebook's "opposition" then goes even further to request leave to "submit further briefing regarding the factual inaccuracies in Six4Three's Disqualification Memo." Facebook's "Opposition," at 9, n.2. All of this is contrary to law. CJER, *Cal. Benchguide: Disqualification of Judge* (Rev. 2010) § 2:26 ("*Benchguide*"), citing, *Garcia v. Superior Court*, 156 Cal.App.3d 670, 680 (1984); *Benchguide* § 2:28.

"A corporation cannot represent itself in court, either in propria persona or through an officer or agent who is not an attorney." *Merco Constr. Engineers, Inc. v. Municipal Court*, 21 Cal.3d 724, 729 (1978); *see also* April 30, 2019 Order at Attch. 13, ¶ 7 (Olson Decl., Ex. 9) (same, citing Rutter Group Cal. Prac. Guide: Corps. Ch. 2-A ¶ 2:37.2 (2019)). Thus, it was legally impossible for Six4Three to act, let alone not "practicable." This legal impossibility was the direct result of Facebook's unfounded accusations against Former Counsel and Judge Swope's decision to proceed *ex parte* notwithstanding Six4Three's lack of representation. The Court of Appeal's April 19, 2019 order confirmed the very same facts and law that prevent Judge Swope from striking the disqualification as untimely—as a corporate defendant without representation, Six4Three had no legal capacity to file briefs or motions to advocate on its own behalf. The Court of Appeals' April 19, 2019 order demonstrates that it was not "practicable" for Six4Three to have filed any disqualification until the appearance of New Counsel.

b. Facebook Disingenuously Relies on an Unpublished Superior Court Decision to Dream Up Its Own "Earliest Practicable Opportunity" Standard Contrary to Well Established Law

Facebook's "opposition" conveniently ignores the undisputed fact, confirmed by the Court of Appeal, that Six4Three lacked representation, which has been a central issue in these proceedings since November 2018. Rather, it is telling that Facebook is forced to rely on an unpublished Superior Court decision to create an impression that near-instantaneous timeframes are required under the "earliest practicable opportunity" standard.[2] This unpublished decision is belied by the decisions of the Court of Appeal, which universally recognize that the purpose of Section 170.3(c)(4) is to prevent a party from playing "fast and loose…by permitting the proceedings to go to a conclusion which [the party] may acquiesce in, if favorable, and which he may avoid if not," *People v. Scott*, 15 Cal.4th 1188, 1207 (1997), or "sit[ting] through a first trial hoping for an acquittal, secure in the knowledge

[2] Facebook principally relies upon an uncitable Superior Court opinion, *Gonzalez v. The Mony Grp.*, No. BC229923, 2001 WL 36013138 (Cal. Super. Ct. July 2, 2001), along with other unpublished opinions of Superior Courts. This ignores the command of California Rule of Court 8.1115. "Trial court decisions are not precedents binding on other courts under the principle of stare decisis." *Harrott v. Cty. of Kings*, 25 Cal. 4th 1138, 1148 (2001). These portions of Facebook's brief should be stricken on this additional ground as well. It is further worth noting that one ground upon which the Superior Court in *Gonzalez* found the disqualification untimely was the fact that it was filed "after the hearing of June 20, 2001," implying that it was intended to express an after-the-fact disapproval of the judge's ruling, *Gonzalez*, at 2, which is the exact situation Section 170.3(c)(4) is intended to prohibit. Facebook conveniently ignores this critical distinguishing fact in its improper "opposition".

that he can invalidate the trial later if it does not net a favorable result." *In re Steven O*, 229 Cal.App.3d 46, 55 (1991). This makes sense. And this is the key point upon which the Court of Appeals relies in each of the cases cited by Facebook. Yet Facebook relies on these cases disingenuously for the proposition that waiting eight days to file a challenge somehow constitutes a waiver. Not so. *See, e.g., Hayward*, 2 Cal.App.at 40 (finding timely a motion to disqualify filed "two weeks later"). What's more, in each case upon which Facebook relies the challenging party had legal capacity to challenge.

Further, that courts recognize a distinction at all between when the facts of disqualification arise and when the judicial determination of disqualification occurs undermines Facebook's position entirely. *See Hayward*, 2 Cal.App.5th at 26–27, 44 (disqualification statement filed October 2014 voided all orders issued by the judge for two years, since October 2012). If Facebook's position was in fact the law—that a litigant must race to the courthouse to file any charging document within a couple days—an entire line of well-settled appellate cases, which void all orders issued in the time between the facts of disqualification and its determination, would be contrary to law. *See Hayward*, 2 Cal.App.5th at 42, *Christie v. City of El Centro*, 135 Cal.App.4th 767, 776–777 (2006); *Rossco Holdings, Inc. v. Bank of Am.*, 149 Cal.App.4th 1353, 1363 (2007). This cannot be so.

Rather, the key issue is whether the party is waiting to see if it obtains a favorable result from a judge before filing its challenge against that judge. Here, once Judge Swope issued his Order on August 1, 2019 requiring Six4Three to retain "full-scope" counsel, New Counsel worked over the weekend to ensure that the Section 170.1 Disqualification was filed in advance of the hearing on whether to re-open discovery into the alleged crime or fraud purportedly committed by Six4Three and its Former Counsel. New Counsel worked around the clock precisely to prevent any legitimate accusation of gamesmanship and filed its challenge before the August 7 hearing.

c. The Statement of Disqualification Was Filed Promptly After Six4Three Regained the Legal Capacity to Participate in These Proceedings and Only Days After the Last Act Described in the Statement of Disqualification.

Filing a Statement of Disqualification is no small matter. In getting up to speed on the highly complex prior proceedings, New Counsel spent time familiarizing itself with the record and, based on this review and the Court's conduct following the July 19, 2019 hearing, determined that a Section 170.1 Disqualification was appropriate. Notably, at the July 19 Case Management Conference,

Facebook's counsel asked Judge Swope specifically to order Six4Three to obtain "full-scope" counsel. Olson Decl., Ex. 7 at 23:20-25. But Judge Swope did not take Facebook up on its proposal, but rather stated that Six4Three needed counsel on two fronts: " One, the corporation [needs counsel] with regard to any discovery that would be propounded; and second, as to any contempt or sanctions that will be pursued by Facebook against your client. Your client's company, okay? I can do no more than that." *Id.* at 28:21–29:4. Despite stating on the record that Six4Three needed representation for discrete issues in the case, and no prior order having been entered directing Six4Three to retain "full-scope" counsel, the Court entered an order prepared by Facebook (and over Six4Three's objection) that misstated its prior orders and directed Six4Three, for the first time, to retain "full-scope" counsel *in three business days*.[3] The August 6 Statement was filed just three business days after the August 1 Order, and specifically relied upon these additional new facts as mandatory grounds for disqualification. This is timely under Section 170.3(c)(4).

d. Six4Three's August 6 Statement of Disqualification Is Proper and Cannot be Stricken on Any Procedural Ground

Facebook contends Six4Three's August 6 Statement should be stricken because: (1) it constitutes a second statement; (2) filed in the absence of any new facts; and (3) states no legal grounds for disqualification pursuant to Section 170.4(b). Not so on all three counts.

First, the July 12 Statement was erroneously filed in connection with Six4Three's separate preemptory challenge under Section 170.6 under the mistaken belief that the filing was required to perfect the pending writ proceedings. It was thereafter stricken by Judge Swope for procedural defects, including lack of service on the Court or its clerk. *See Magana v. Superior Court*, 22 Cal.App.5th 840, 854–55 (2018) (requiring compliance with service requirements under Section 170.3(c)(1)). Striking in this context means "to expunge, as from a record." *Black's Law Dictionary* 1559 (Bryan A. Garner ed., 9th ed., West 2009). Hence, the erroneously filed statement is a nullity.

[3] If Six4Three's financial position had permitted it to retain full-scope counsel, it would have done so. Judge Swope's decision to undermine Six4Three's fundamental right to choose its counsel in the absence of any legitimate inconvenience or impairment of the judicial proceedings was erroneous and highly prejudicial, as it would have resulted and may still result in the removal of Six4Three's choice of counsel, in derogation of California law. *See*, *e.g.*, *People v. Daniels*, 52 Cal.3d 815, 846 (1991).

In any event, parties are permitted to cure such procedural defects. *Cf. Hollingsworth v. Superior Court*, 191 Cal.App.3d 22, 25 (1987) (declaration in lieu of verified statement authorized); *People v St. Andrew*, 101 Cal.App.3d 450, 456 (1980) (in context of Section 170.6 challenge, judge should permit cure of procedural defects). Facebook was afforded this very opportunity when it filed three separate Section 170.6 challenges against Judge Weiner on January 19, January 24, and January 26, 2018, the first two of which were procedurally deficient and stricken by the Court. At no time did the Court ever state that Facebook had somehow waived its right to refile the Section 170.6 challenge due to the procedural deficiency in Facebook's prior filings, and the January 26 challenge was granted by the Court. Rather, Facebook's contorted application of Section 170.3(c)(4) to these facts essentially boils down to a requirement that Six4Three must elect whether to file a §170.6 challenge *or* a §170.1 disqualification, but that Six4Three is *not* permitted to file both. On Facebook's view, once Six4Three filed one type of challenge, it was automatically time-barred from filing the other. The law places no such requirement on Six4Three. Because the July 12 Statement was a nullity, the August 6 Statement is the first and only statement properly served in connection with the Section 170.1 Disqualification.

Second, even if the Court accepts Facebook's contorted position, the Court's entry of the August 1 Order was the proverbial straw that broke the camel's back and occurred *after* the July 12 Statement. Facebook simply makes up that the Court's orders prior to August 1 required "full-scope" representation. They do not. Thus, a second statement was permissible under Section 170.3(c)(4).

Third, Facebook claims that the August 6 Statement is procedurally deficient pursuant to Section 170.4(b) because (a) it is somehow not verified; (b) it incorporates the facts set forth in Six4Three's Disqualification Memorandum; and (c) it is conclusory. Facebook's "Opposition," at 9. Again, Facebook gets it wrong on all three counts. The same *Benchguide* upon which Facebook relies for these points makes clear that a declaration under penalty of perjury is sufficient to satisfy the verification requirement. *Benchguide* § 2:25, citing, *Urias*, 234 Cal.App.3d at 421, n.4; *Hollingsworth*, 191 Cal.App.3d, at 25; *see also Hayward*, 2 Cal.App.5th at 40 n.27.

It is not disputed that the declaration attached to the Statement of Disqualification was filed "under penalty of perjury under the laws of the State of California." Olson Decl. at 5. It is further not disputed that the declaration attached to the August 6 Statement attaches all of the facts and evidence

in support of mandatory disqualification. Olson Decl. at ¶¶ 4-24. Thus, the allegations are far from conclusory: they cite and attach as exhibits over 21 specific instances that mandate disqualification, all as laid out in detail in the Disqualification Memo incorporated into the August 6 Statement. Olson Decl. at ¶ 3.

Finally, Facebook claims that the accepted practice of attaching and incorporating a memorandum of points and law into a declaration is somehow inappropriate in an attempt to distract from the plain fact that all of the evidence upon which Six4Three relies in seeking disqualification was attached directly to the August 6 Statement and declaration filed under penalty of perjury. This is sufficient and neither Facebook nor Judge Swope may pass on "the sufficiency in law or fact of the statement of disqualification." *Benchguide* § 2:26, citing, *Garcia v. Superior Court*, 156 Cal.App.3d 670, 680 (1984).

CONCLUSION

For the reasons set forth herein, Facebook's improper "opposition" must be stricken, the procedure required under Section 170.3 must be followed, and Six4Three's Disqualification cannot be stricken under any legally cognizable ground. Judge Swope's options are clearly prescribed. *Benchguide* § 2:28. Instead of pursuing *any* of the required options under the law, Judge Swope effectively asked Facebook to handle this matter for him, yet again leading any reasonable person aware of these facts to doubt the appearance of impartiality.

DATED: August 13, 2019

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